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No. 83-103

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,

Petitioner,

vs.

**NATIONAL LABOR RELATIONS BOARD and
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO, LOCAL 246,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

**RESPONSE TO MOTION TO VACATE THE
JUDGMENT OF THE COURT OF APPEALS
AND TO REMAND THE CASE TO THE
NATIONAL LABOR RELATIONS BOARD FOR
FURTHER PROCEEDINGS**

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Petitioner Woodkraft Division/Georgia Kraft Company opposes the Solicitor General's Motion to Remand the case to the National Labor Relations Board ("Board") for reconsideration in light of the Board's recent decision in *Clear Pine Mouldings, Inc.*, 268 NLRB No. 173 (February 22, 1984) for the following reasons:

1. The vital legal issue before this Court is whether Section 7 of the National Labor Relations Act ("Act"), 29 U.S.C. § 151 *et seq.* gives striking employees the right to threaten and intimidate nonstriking employees. [See, Brief for Petitioner, Question Presented]. *Clear Pine Mouldings* does not resolve this important and recurring question. In *Clear Pine Mouldings*, the Board finally

abandoned its discredited theory that words alone can never warrant a denial of reinstatement of a striking employee. The Board adopted the Third Circuit's objective standard for evaluating threats. However, while Board Members Zimmerman and Dennis concurred in adopting the objective standard, they specifically declined to agree with any of the legal reasons the current Board Chairman and Board Member Hunter advanced for adopting the new standard. Members Zimmerman and Dennis expressly disagreed with the Board's analysis of the right to strike, Section 8(c) of the Act, and the legislative history of the Act. [Decision, 16]. Furthermore, in Footnote 2 of his concurring opinion, Member Zimmerman argues that even under the new standard, the Board may continue to condone verbal threats aimed at nonstriking employees just because they take place during a strike.

2. Only this Court can determine finally whether Section 7 of the Act protects striking employees in threatening and intimidating nonstriking employees. Obviously, the Board's adoption of the Third Circuit's objective standard for evaluating threats is welcomed and urged by Petitioner. Petitioner respectfully requests that this Court adopt this objective standard. Until now, this Court has not taken the opportunity to address this important and recurring issue of an employer's right to discipline strikers for threatening and coercing nonstriking employees. Petitioner has consistently argued that the plain language of the statute and the legislative history show that such threats violate the Section 7 rights of nonstriking employees to refrain from engaging in concerted activity.

Although the current Board Chairman Dotson and Member Hunter have adopted this view, recent cases show that the Board repeatedly reverses its rulings. See, e.g., *Milwaukee Spring*, 265 NLRB No. 28 (January 23, 1984) (reversing its earlier decision and order in the same

case, *Milwaukee Spring I*, 265 NLRB 28 (1982)); *United Technologies Corporation*, 268 NLRB No. 83 (January 19, 1984) (overruling *General American Transportation Corporation*, 228 NLRB 808 (1977)); *Meyers Industries, Inc.*, 268 NLRB No. 73 (January 6, 1984) (overruling *Alleluia Cushion Company*, 221 NLRB 999 (1975)); *Our Way, Inc.*, 268 NLRB No. 61 (December 20, 1983) (overruling *T.R.W., Inc.*, 257 NLRB 442 (1981)); see, especially, *Midland National Life Insurance Company*, 263 NLRB 127 (1982) (overruling *General Knit of California, Inc.*, 239 NLRB 619 (1978) which overruled *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), which overruled *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962)).

3. Judicial economy would best be served by deciding this case. A remand to the Board is not necessary since it does not take special expertise in labor relations to identify threatening and coercive conduct. Furthermore, a remand for redetermination by the Board may not finally settle the issue because strikers Bishop and Hughes, Charging Party Laborers International Union of North America Local 246, or Petitioner Georgia Kraft will have the right to appeal a final order of the Board should it be adverse to their position. 29 U.S.C. § 160(f).

4. If this Court decides to remand to the Board for a determination on the merits, the remand should come only after this court has determined the substantive legal rights raised in the Petition for Certiorari. See, *Bachrodt Chevrolet Company v. NLRB*, 411 U.S. 912 (1973).

For the reasons stated, Petitioner Georgia Kraft respectfully requests that this Court deny the Solicitor General's Motion, retain jurisdiction and render a decision that Section 7 does not give striking employees the right to threaten and intimidate nonstriking employees. This Court should adopt the objective standard of the Third Circuit, *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3rd

Cir. 1977) and specifically rule that William Walker was reasonably coerced in the exercise of his protected Section 7 rights when he was subjected to profane threats by intoxicated strikers made at his home in front of his family.

Respectfully submitted,

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